

1. The court order that Robyn Schmalenberger, Warden of the North Dakota State Penitentiary, be substituted as the Respondent in place of the State of North Dakota;
2. Respondent's Motion to Dismiss (Doc. No. 17) be **GRANTED**;
3. Darby's Petition under 28 U.S.C. § 2254 for a Writ of Habeas Corpus by a Person in State Custody (Doc. No. 2) be **DENIED**;
4. The court certify that an appeal from the denial of the petition may not be taken *in forma pauperis* because such an appeal would be frivolous and cannot be taken in good faith; and
5. A certificate of appealability not be issued.

See Docket No. 20, p. 58. Neither of the parties filed an objection to the Report and Recommendation.

On February 25, 2013, the State of North Dakota filed a response to the order to show cause providing in relevant part as follows:

According to the North Dakota State Penitentiary (“NDSP”), the Petitioner, Vonnie D. Darby (“Darby”), was transferred from the NDSP to the James River Correctional Center on January 31, 2013. Don Redmann is the Warden of the James River Correctional Center. Don Redmann is the state officer having physical custody of Darby and should be named as the Respondent in accordance with Rule 2(a) of the Rules Governing Section 2254 Cases in the United States District Courts.

See Docket No. 21.

The Court has carefully reviewed the Report and Recommendation, relevant case law, and the entire record, and finds the Report and Recommendation to be persuasive. Accordingly, the Court **ADOPTS** the Report and Recommendation (Docket No. 41) and **ORDERS** the following:

- 1) Don Redmann, Warden of the James River Correctional Center, shall be substituted as the Respondent in place of the State of North Dakota;
- 2) The Court **GRANTS** the Respondent’s Motion to Dismiss (Docket No. 17);
- 3) The Court **DENIES** Darby’s Petition under 28 U.S.C. § 2254 for a Writ of Habeas Corpus by a Person in State Custody (Docket No. 2);
- 4) The Court certifies that an appeal from the denial of the petition may not be taken *in forma pauperis* as such an appeal would be frivolous and cannot be taken in good faith; and
- 5) No certificate of appealability is issued.

IT IS SO ORDERED.

Dated this 26th day of March, 2013.

/s/ Daniel L. Hovland

Daniel L. Hovland, District Judge
United States District Court